



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/812,380	03/29/2004	Iftekhar Khan	1800-000001	2606
7590 Nazir A Khan MD 150 Glenmora Drive Burr Ridge, IL 60527				
EXAMINER				
DEAK, LESLIE R				
ART UNIT		PAPER NUMBER		
3761				
MAIL DATE		DELIVERY MODE		
11/18/2010		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

*Ex parte* IFTIKHAR KHAN and NAZIR KHAN

---

Appeal 2010-003194  
Application 10/812,380  
Technology Center 3700

---

Before WILLIAM F. PATE III, STEVEN D.A. McCARTHY and  
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

McCARTHY, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING<sup>1</sup>

---

<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

1           The Appellants have filed a request for rehearing under 37 C.F.R.  
2 41.52(a)(1)” [“Request”]. The Request seeks reconsideration of our  
3 Decision of August 24, 2010 [“Decision”] affirming the rejection of claim  
4 17 under 35 U.S.C. § 103(a) as being unpatentable over Squitieri (US  
5 6,102,884, issued Aug. 15, 2000), Parks (US 5,399,173, issued Mar. 21,  
6 1995) and Twardowski (US 5,509,897, issued Apr. 23, 1996). We have  
7 jurisdiction under 35 U.S.C. § 6(b).

8           The Appellants present ten points for our reconsideration. The first  
9 nine points presented by the Appellants do not identify any point  
10 misapprehended or overlooked by the Board in deciding the appeal. The  
11 purpose of a rehearing is to provide the Appellants an opportunity to identify  
12 “points believed to have been misapprehended or overlooked by the Board,”  
13 37 C.F.R. § 41.52(a)(1), not to provide the Appellants a second appeal.  
14 Although the Appellants contend in point 3 that the Board overlooked the  
15 state of the law (*see* Request 1), we responded to the Appellants’ contention  
16 indirectly in the Principles of Law section on page 9 of the Decision and in  
17 the Analysis section on pages 10-11 of the Decision. We deny the Request  
18 as to the Appellants’ points 1-9.

19           We grant the request as to point 10 to the extent that we recognize that  
20 the Appellants filed an executed “Declaration in Support of Application”  
21 (“Declaration”) on April 16, 2009.<sup>2</sup> We vacate FF 17 on page 8 of the

---

<sup>2</sup> Although the Declaration was filed after the Notice of Appeal, the Examiner promised the Appellants during an interview that the Examiner would “consider the declaration and issue separate correspondence relating to the declaration.” (Interview Summary mailed April 23, 2009, Continuation Sheet). Therefore, the executed Declaration was entered for purposes of this appeal.

Decision. We modify FF 14 on page 8 of the Decision as follows:

14. The Appellants present an executed declaration to which the results of two studies are attached. Each involved “HeRO” vascular access devices, which the Appellants’ executed declaration identifies as hemodialysis arteriovenous shunts “identical to the applicants claimed invention.”

In the Declaration, the Appellants declare that:

the HERO™ (Hemodialysis Reliable Outflow) vascular access device, manufactured by Hemisphere Inc. company is a hemodialysis arteriovenous shunt identical to the applicants claimed invention. Clinical studies revealed new and unexpected results.

These results are a marked decrease in bacteremia rate versus currently used cuff tunneled dialysis catheters and current arteriovenous graft literature. Improved adequacy of dialysis and patency versus currently used cuffed tunneled dialysis catheters.

(*Id.*)

Nevertheless, we agree with the Examiner that the Examiner’s evidence of obviousness, including the disclosures of Squitieri, Parks and Twardowski, outweighs the Appellants’ evidence of non-obviousness, including the Appellants’ executed Declaration and the two exhibits to the Declaration. Although the Declaration and its Exhibit 1 provide some evidence supportive of a finding that the subject matter of claim 17 provides unexpectedly reduced bacteremia as compared to rates reported in current arteriovenous graft literature, the Declaration fails to provide comparative data showing substantially improved results *viv-a-vis* the disclosure of the closest prior art, Squitieri.. The Declaration and its Exhibit 1 provide no

persuasive evidence of improved patency as compared to patency reported in current arteriovenous graft literature, since Exhibit 1 reports that the two patencies were found to be equivalent. The Declaration and its Exhibit 2 provide no persuasive evidence of improved dialysis, since Exhibit 2 provides raw results with no comparison to results for arteriovenous grafts. We give little weight to comparisons against cuffed tunneled dialysis catheters because the closest prior art, Squitieri, does not disclose a cuffed tunneled dialysis catheter.

On the other hand, the Examiner has provided strong evidence of obviousness, including an apparent reason for modifying Squitieri's device in the fashion claimed in claim 17 independent of bacteremial properties such as those described in Exhibit 1. While we give some weight to the evidence offered by the Appellants in an effort to prove unexpected results, we conclude that the Examiner's evidence of obviousness outweighs the Appellants' evidence of nonobviousness.

## DECISION

We deny the Request as to points 1 through 9. We grant the Request to the extent that we have considered the arguments relating to point 10 and weighed the evidence of obviousness and non-obviousness anew, but otherwise deny the Request.

DENIED

K1h

NAZIR A. KHAN, MD  
150 GLENMORA DRIVE  
BURR RIDGE, IL 60527